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DIVISION OF
OIL, GAS AND MINING

STOEL RIVES LLP

ATTORNEYS

ONE UTAH CENTER
201 S. MAIN STREET, SUITE 1100
SALT LAKE CITY, UTAH 84111-4904
Phone (801) 328-3131 Fax (801) 578-6999
Internet: www.stoel.com

5/003/020

Received Terry G
6-12-01
@ noon

June 12, 2001

JOHN S. KIRKHAM
Direct Dial
(801) 578-6956
email: iskirkham@stoel.com

VIA HAND DELIVERY

Sally Wisely
State Director
Bureau of Land Management
Utah State Office
P.O. Box 45155
Salt Lake City, Utah 84145-0155

**Re: REQUEST FOR STATE DIRECTOR REVIEW
Notice of Non-Compliance U-69380 (UT-023)
Northern Stone Supply, Inc.**

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DEPT. OF INTERIOR
BUREAU OF LAND MGMT

Dear Ms. Wisely:

This letter is filed on behalf of Northern Stone Supply, Inc. ("Northern Stone") and its President, Mr. Gary Mullard. This letter is filed in response to a Notice of Non-Compliance dated May 14, 2001 received by Northern Stone on May 16, 2001. Mr. Mullard is separately filing two other letters in a good faith attempt to respond to the requirements of the Notice of Non-Compliance. This letter is intended to address issues not addressed in Mr. Mullard's letters. The combination of the three letters is intended to constitute Northern Stone's response to the Notice of Non-Compliance.

The purposes for this letter are as follows:

REQUEST FOR STATE DIRECTOR REVIEW

REQUEST FOR STAY PENDING STATE DIRECTOR REVIEW

SUPPLEMENTAL RESPONSE TO NOTICE OF NON-COMPLIANCE

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BACKGROUND

The issuance of the Notice of Non-Compliance represents continuing action by the Salt Lake Field Office which is arbitrary and capricious and represents an abuse of administrative discretion. While Northern Stone disagrees with the position of the BLM as set forth in the Notice of Non-Compliance, Northern Stone will be submitting under separate cover within the time prescribed in the Notice of Non-Compliance additional documents intended to fully comply with the legitimate requests contained in the Notice of Non-Compliance. These combined documents provide all of the information requested in connection with Northern Stone's operations on the public lands. However, as has been demonstrated by BLM action on several occasions in the past, the action of the Salt Lake Field Office in issuing the Notice of Non-Compliance clearly ignores prior decisions by the BLM with respect to Northern Stone's operation and therefore requires this request for State Director review.

As will be demonstrated by documents contained in the Salt Lake Field Office records, with the exception of Item No. 3, each of the items required of Northern Stone in the Notice of Non-Compliance has previously been fully satisfied under the requirements of the regulations. Continued harassment of Northern Stone by the Salt Lake Field Office constitutes arbitrary and capricious actions that must be controlled by the State Director. Gary Mullard, as the President of Northern Stone, has been willing to attempt to resolve all of these issues in an amicable way that is in full compliance with the requirements of the regulations. However, the representatives of the Salt Lake Field Office refuse to acknowledge the prior decisions with respect to Northern Stone's operations. Those arbitrary and capricious actions on behalf of the Salt Lake Field Office have therefore imposed upon Northern Stone the obligation to again appeal to the State Director for review of a Notice of Non-Compliance issued in connection with its operations.

REQUEST FOR STATE DIRECTOR REVIEW

This request for State Director review is filed in accordance with the requirements of 43 CFR § 3809.805. Northern Stone is specifically requesting a meeting with the State Director to review the content of this request, as well as the circumstances involving Northern Stone's operations on the public lands. For purposes of contacting Northern Stone, please use the following contact information:

John S. Kirkham
Attorney for Northern Stone Supply, Inc.
Stoel Rives LLP
201 South Main, Suite 1100
Salt Lake City, Utah 84111
(801) 578-6956
(801) 578-6999 (fax)

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and

Gary Mullard
President
Northern Stone Supply, Inc.
P.O. Box 249
Oakley, Idaho 83346
(208) 862-3353
(208) 862-3846 (fax)

Northern Stone is specifically requesting that the State Director review the following requirements as contained in the Notice of Non-Compliance:

1. "Submit a new Plan of Operations which will describe . . ." (emphasis supplied)
2. "Remove the fence that encloses the eastern, southern and western perimeters of your Turquoise Stone #4 mill site."

...

4. "Under Use and Occupancy regulations at 43 CFR 3715.3-2, you must submit a detailed map that identifies the use and occupancy . . ."

HISTORICAL BACKGROUND

Northern Stone's Plan of Operation has been the subject of several previous appeals and a significant amount of correspondence between Northern Stone and the BLM. We will not attempt to review that entire history in this correspondence, but will provide the essential elements of the record to substantiate Northern Stone's reasons for requesting State Director review.

Northern Stone filed a Plan of Operations on September 28, 1992. That plan was supplemented by an Amendment dated October 13, 1992. The Salt Lake District Office prepared an Environmental Assessment (EA No. UT-020-93-010) which was completed on March 12, 1993. On March 30, 1993, Leon E. Berggren, the Bear River Area Manager, signed the Decision Record which included a Finding of No Significant Impacts and allowed Northern Stone to conduct its operations in accordance with the Plan of Operations and amendments to the plan.

While we assume the EA is in the record that will be submitted by the Salt Lake Field Office, we call your specific attention to the second paragraph on page 2 under history which

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specifically identifies the issue concerning a fence and locked gate and the fact that Northern Stone was told that the existence of the fence and locked gate could be authorized by "receiving acceptance or approval of a properly filed notice of plan of operations under the surface mining regulations (43 CFR 3809)." With respect to issues relevant to this appeal, we also call your attention to the third full paragraph of page 4 of the EA in which it is specifically stated that Northern Stone intended to construct an airfield or short landing strip "on two newly filed mill site claims." Those mining claims are mill sites #4 and #5 which were clearly delineated on both the mineral survey and the aerial photo that were submitted in connection with the initial Plan of Operations. In the next full paragraph on that page, it is stated "In an Amendment dated October 13, 1992 to the original submission of the plan, Northern Stone mentions the importance of fencing their living, storage and working areas to preclude liability, theft, vandalism, invasion by livestock, and to warn the public of dangerous areas."

The EA contains a detailed reclamation plan, it contains a detailed analysis of the "affected environment" and, with respect to issues such as cultural resources, it is clear that the entire area, including mill sites #4 and #5, were inventoried and no significant sites were located during the inventory (page 18).

With respect to the impact on mill sites #4 and #5, it is clear from a review of a map filed with the Plan of Operations that the area to be impacted by the landing strip was contained in mill sites #4 and #5, but there was no delineation as to the exact location of the landing strip other than the white line on the map. Therefore, it can only be assumed that all of the area of Northern Stone's properties, including all of mill sites #4 and #5, were analyzed in the EA.

The Salt Lake Field Office file contains several other items of correspondence relating to Northern Stone's appeal and several inspections that occurred with respect to the property.

The next relevant document of significance is a letter dated September 22, 1994 sent by Deane H. Zeller, District Manager, and addressed to Mr. Gary Mullard at Northern Stone Supply. The letter summarizes the understandings and agreements reached at a meeting held on September 2, 1994. This letter contains agreement on several specific areas. First, it was agreed that a bond would be submitted in the amount of \$13,000.00. The bond was submitted and still is on file with the BLM. The third paragraph recites that action on the fence on the "northern boundary" of the mining claims was to be deferred and that the fence was "to remain in its present state of disrepair." Further on in the letter it is stated,

We agree to further consultations on, and to remedy if necessary, the following:

A. recent deposition of rock into the stream bed upstream from where the old dugway road entered Rock Creek,

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B. new location of the fence and entry gate to the facility on the south side of the property.

-and-

C. We would inspect any areas of the operation that you have reclaimed.
(Emphasis supplied)

As indicated in Mr. Zeller's letter, there was an appeal pending before the Interior Board of Land Appeals ("IBLA") with respect to the Plan of Operations. On September 10, 1996, the IBLA issued a "Show Cause Order" in that appeal. In response to the Show Cause Order, David K. Grayson, Assistant Field Solicitor for the Department of the Interior, made a filing with the IBLA entitled "ANSWER OF THE BUREAU OF LAND MANAGEMENT TO ORDER TO SHOW CAUSE." We call your specific attention to the fact that the Show Cause Order was issued September 10, 1996 and that the Answer of the Bureau of Land Management was shown on the Salt Lake Field Office's own copy of the Answer as having been received on September 30, 1996 by the IBLA.

The critical portion of the BLM's answer reads as follows:

During an inspection on May 6, 1996, it was noted that the fence and gate placement and maintenance were consistent with the approved plan and no airstrip had been constructed. On October 11, 1994, the Salt Lake District received a surety bond in the amount of \$13,000.00 for Plan of Operations UTU 69380. Mr. Mullard through Northern Stone, Inc. is operating the quarry covered by UTU 69380 in a prudent and responsible manner and in compliance with the regulations found at 43 CFR 3809. We see no issue in Plan of Operations UTU 69380 on which action by the Interior Board of Land Appeals is required.

In reviewing the "answer" by the BLM in the context of Mr. Zeller's letter, it is clear that the parties had agreed to a "new location of the fence and entry gate to the facility on the south side of the property." Northern Stone submits that the new location agreed to in consultation with the BLM and as reviewed in the inspection on May 6, 1996 was the precise location of the current gate placement and fence placement as it exists today. The "maintenance" referred to in the "answer" has reference to the northern portions of the fence remaining in a state of disrepair.

The allegations contained in the Notice of Non-Compliance refer to the fact that the gate and fence are not located as shown by a line on the aerial photo as originally submitted in 1992. That allegation is clearly true because the fence was moved after "consultation" with the BLM to its present location. There is no evidence in the Field Office file and there is nothing in the Notice of Non-Compliance to support any allegation that the fence or the gate have been moved

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since the inspection on May 6, 1996 and the representation to the Interior Board of Land Appeals on September 30, 1996 that the fence and gate placement were consistent with the approved plan.

The Notice of Non-Compliance refers to a BLM request that BLM be provided with an interlock which can be placed on the main gate. In Mr. Mullard's direct response to the Salt Lake Field Office with respect to this matter, you will see that Mr. Mullard is agreeable to providing such an interlock and stands ready to comply with that requirement of the Notice of Non-Compliance.

The Notice of Non-Compliance, at paragraph 4, indicates that Northern Stone must submit a detailed map that identifies the use and occupancy of the mine site in accordance with the provisions of 43 CFR 3715.3-2. As you will see from Northern Stone's direct response, Northern Stone is willing to again make a recital to the BLM in connection with the requirements of 43 CFR, Part 3710. However, notwithstanding Northern Stone's willingness to accommodate the BLM's requirements, as a part of the State Director's review, we call your specific attention to the provisions of the Federal Register notice that adopted the regulations at 43 CFR, Part 3710 as a final rule. The Federal Register notice appeared in the Federal Register of Tuesday, July 16, 1996. You will note at page 37116 the effective date of the regulations is August 15, 1996. Therefore, the regulations referred to by BLM in its Notice of Non-Compliance found at 43 CFR 3715 were in effect for more than a month prior to the filing of the Answer of the Bureau of Land Management with the Interior Board of Land Appeals. Again, that answer specifically states that "Mr. Mullard through Northern Stone, Inc. is operating . . . in compliance with the regulations found at 43 CFR 3809."

We call your specific attention to the provisions of 3715.3 as contained in Table 2. Under the heading "consultations required," there is a line item that reads: "Under a plan of operations or a modification submitted under 43 CFR Part 3800, Subpart 3802 or Subpart 3809;" the column under the heading "then" reads, "You must include in the proposed plan of operations the materials required by 3715.3-2 describing any proposed occupancy for BLM review concurrently with review of the plan of operations. BLM will determine whether you have complied with the requirements of this subpart, together with its decision approving or modifying the plan."

On November 21, 2000, the BLM published a final rule with respect to the 3809 regulations. The new rule had an effective date of January 20, 2001. For purposes of this State Director review, we will assume that those regulations now govern the Notice of Non-Compliance. However, we assume that other administrative actions might be taken during the pendency of this State Director review that could impact the regulations that govern this appeal.

43 CFR 3809.423 specifies, "Your plan of operations remains in effect as long as you are conducting operations, unless BLM suspends or revokes your plan of operations for failure to

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comply with this subpart." Newly adopted 3809.431 reads, "When must I modify my plan of operations?" "You must modify your plan of operations when any of the following apply: (a) before making any changes to the operations described in your approved plan of operations; (b) when BLM requires you to do so to prevent unnecessary or undue degradation; . . ."

The newly promulgated regulations also contain requirements concerning individual financial guarantees. Without reciting all of those provisions, it is clear at 3809.553 that a financial guarantee may be authorized to cover only a portion of the operations and the financial guarantee is to be based upon the operator's estimate as to the cost to reclaim the operations "as if BLM were hiring a third party contractor to perform reclamation of your operations after you have vacated the project area."

ANALYSIS OF THE REQUIREMENTS OF THE NOTICE OF NON-COMPLIANCE

1. Analyzing the "requirements" of the Notice of Non-Compliance in the context of the historical background, it is obvious that the first requirement to "Submit a new plan of operations . . ." is arbitrary, capricious and an abuse of administrative discretion. There is an existing plan of operations on file that has been approved by the BLM and has been represented to the Interior Board of Land Appeals as being "in compliance with the regulations found at 43 CFR 3809." It is arbitrary, capricious and an abuse of administrative discretion to require a "new" plan of operations from Northern Stone when a plan of operations with respect to the entire area of Northern Stone's activity is in existence. As explained in the supplemental materials referred to in this letter and as explained in Mr. Mullard's letters, Northern Stone is requesting that the BLM approve a modification to the existing Plan of Operations to allow for the relocation of the rock crusher and the placement of certain aggregate stockpiles on mill site #5. However, it should be clear to the BLM that this is simply a minor modification as what has previously been proposed by Mr. Mullard for this area. The area of the proposed access road as shown on the enclosed map parallels generally the area that originally was intended to be disturbed for the landing strip and the location of the aggregate stockpiles is clearly within the area originally examined at the time of the initial EA. The file clearly indicates that the BLM requested that Mr. Mullard not use the area for purposes of a landing strip, but it is clear the area had been reviewed for surface disturbing activities. There is nothing in the file after the EA had been prepared to indicate that Mr. Mullard could not use these areas for surface disturbing activities with the proper BLM approvals. Mr. Mullard is submitting a request for a modification of the existing Plan of Operations, together with the materials required by 3809.430, et. seq., but it is arbitrary and capricious to require Northern Stone to submit a "new" "complete" Plan of Operations under 3809.401 as specified in the Notice of Non-Compliance.

2. The second requirement of the Notice of Non-Compliance would require Mr. Mullard to remove the fence that encloses Turquoise Stone #4 mill site. This requirement is obviously based upon the location of the white line on the aerial photo submitted with the original Plan of

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Operations in 1992. As indicated above, the current location of the fence along the eastern, southern and western perimeters of Turquoise Stone #4 mill site were previously approved by the BLM in "consultation" with Northern Stone following Mr. Zeller's 1994 letter. The "placement" of the fence was acknowledged as consistent with the "approved plan" by Mr. Grayson in 1996. The need for the fence was clearly evaluated in the EA. Therefore, it would be arbitrary, capricious and an abuse of administrative discretion to now require Northern Stone to remove the fence which the BLM has previously authorized based upon nothing more than an allegation that the existence of the fence at its present location is not authorized under 43 CFR 3715.

4. The fourth requirement of the Notice of Non-Compliance indicates that Northern Stone is to "submit a detailed map" pursuant to the provisions of 43 CFR 3715.3-2. While Mr. Mullard and Northern Stone are making a good faith effort to comply with this requirement through the submission of the map attached to his letter and by the separate submittal being made directly to the Salt Lake Field Office, the imposition of such a requirement is clearly arbitrary, capricious and an abuse of administrative discretion. This requirement clearly ignores all of the preceding documentation submitted in connection with Northern Stone's operations and it is clearly an attempt to impose form over substance.

As indicated previously, the 3715 regulation referred to became effective in August of 1996. Mr. Grayson's answer to the IBLA stated that Northern Stone was in compliance with the regulations at 43 CFR 3809 over a month later. The 3715 regulations quoted above clearly specify that the 3715 requirements will be reviewed concurrently with the Plan of Operations. The determination by the BLM that the requirements of the 3809 regulations have been satisfied is, in accordance with the regulations, a determination that the requirements of the 3715 subpart have similarly been satisfied. Therefore, Mr. Grayson's Answer clearly establishes that the 3715 requirements had been satisfied as of September, 1996. There is no evidence in the Notice of Non-Compliance that any of the surface facilities, including the southern fence, have been moved since that date. The requirement is unwarranted.

Notwithstanding the technicality of the foregoing argument, it should be apparent to the State Director that the factual foundation for the claim with respect to the 3715 regulations by the Salt Lake Field Office is ludicrous. This is an operation that began with hand production in the fall of 1954 (EA at p. 2). It has been inspected on numerous occasions by both the State of Utah and the BLM representatives. It was the subject of an Environmental Assessment in 1993 that contains photographs of the exact location of all of the improvements (other than the fence), and there is no allegation in the Notice of Non-Compliance that any of those structures, enclosures, fences, gates and signs have been moved or relocated, with the exception of the "offending" fence. If that were not enough, these same properties have also been the subject of a mineral report in 1998 that is several hundred pages thick. In that report there is not only a sketch map showing the location of all of the facilities, but the mineral report was based upon a patent application which also contains a mineral survey clearly identifying the location of all of the

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surface facilities. To now somehow claim that Northern Stone has failed to comply with the substantive requirements of the 3715 regulations clearly demonstrates the need for State Director review of the arbitrary and capricious actions of the Field Office.

REQUEST FOR STAY PENDING STATE DIRECTOR REVIEW

Northern Stone is requesting that the State Director stay the effectiveness of the Notice of Non-Compliance pending State Director review. In support of this request, Northern Stone alleges as follows:

1. The Relative Harm to the Parties If the Stay Is Granted or Denied.

If the stay is granted, it will simply maintain the status quo with no harm to the public. The existing bond is more than adequate to cover the cost of removing the offending fence. If the stay is denied, Northern Stone will be required to submit a "new" Plan of Operations; to remove the fence which surrounds three sides of the Northern Stone #4 mill site; and to submit additional materials under the 3715 regulations. All of these requirements will be of significant expense to Northern Stone and would be totally unwarranted if the State Director accepts Northern Stone's arguments with respect to the issues addressed above.

2. The Likelihood of the Appellants' Success of the Merits.

It is highly likely that Northern Stone will succeed on the merits given the factual and historical basis for the State Director review as more fully described above. Particular attention under this heading is called to the fact that the BLM has previously approved the Plan of Operations, including the present location of the fence.

3. The Likelihood of Immediate and Irreparable Harm If the Stay Is Not Granted.

The issue of greatest significance is the existence and location of the fence. As stated in the EA (page 4), the fence is needed to protect the living, storage and working areas of the operations and to preclude liability, theft, vandalism, invasion by livestock, and to warn the public of dangerous areas. On information and belief, it is alleged that livestock are currently grazing in the immediate vicinity of the fence and will be in existence at that location until they are moved by the livestock industry to higher grazing land later in the season. If Northern Stone is required to immediately remove the fence, it would allow livestock to enter into the active working areas of Northern Stone's operations.

4. Whether the Public Interest Favors Granting the Stay.

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The public interest is well served by and favors the granting of the stay in that it will maintain the status quo that has existed at Northern Stone's operations since the Plan of Operations was approved in the mid 1990s. While the Notice of Non-Compliance alleges additional surface disturbance beyond that authorized under the Plan of Operations, there is no substantiated allegation that the bond currently posted with the BLM is inadequate to accomplish the required reclamation. In this regard, it is specifically requested that the State Director review both the allegations contained in the Notice of Non-Compliance with respect to the adequacy of the reclamation bond, as well as the methods used by the Salt Lake Field Office in calculating the amount of the bond that should exist with respect to these operations. The regulations instruct that this is to be an operator calculation subject to BLM review. Northern Stone is particularly concerned that there is no recognition of the significant reclamation that has already occurred.

SUPPLEMENTAL RESPONSE TO NOTICE OF NON-COMPLIANCE

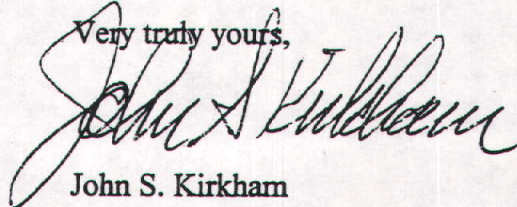
Under separate cover, Northern Stone will be submitting two separate letters addressing the issues raised in the Notice of Non-Compliance. The first letter specifically addresses each of the issues raised in the Notice of Non-Compliance and the second is in substance a request for modification of the approved 3809 Plan of Operations to allow certain additional activities on mill sites #3, #4, and #5. Attached to this letter is a photocopy of a facsimile copy of those letters. Also attached is a copy of the map referred to in those letters describing the location of those activities. These materials are submitted on behalf of Northern Stone in a good faith effort to fully satisfy all of the requirements of the regulations with respect to the operations of Northern Stone.

In this regard, Northern Stone is specifically requesting that the BLM exercise its discretion and authorize the use of the public lands in accordance with the existing Plan of Operations and the supplemental materials filed on behalf of Northern Stone. Such an approval will allow Northern Stone to conduct its operations as indicated in the requests being filed concurrently with this request for State Director review.

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We would sincerely appreciate the opportunity to discuss the issues raised in this letter in greater detail with the State Director as a part of her review of this important matter.

Very truly yours,



John S. Kirkham

JSK/js

Encl.

cc Gary Mullard

Glenn A. Carpenter
Field Office Manager
Bureau of Land Management
Salt Lake Field Office
2370 South 2300 West
Salt Lake City, Utah 84119
(Via Hand Delivery)

D. Wayne Hedberg
Division of Oil, Gas & Mining
Department of Natural Resources
1594 W. North Temple, Suite 1210
Salt Lake City, Utah 84114
(Via Hand Delivery)

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LIST OF ATTACHMENTS

Notice of Non-Compliance dated May 14, 2001

Environmental Assessment (EA No. UT-020-93-010), completed on March 12, 1993

Decision Record dated March 30, 1993, signed by Leon E. Berggren, the Bear River Area Manager, which included a Finding of No Significant Impacts

Letter dated September 22, 1994 from Deane Zeller of BLM to Gary Mullard of Northern Stone

Show Cause Order issued by IBLA, September 10, 1996

Answer of the Bureau of Land Management to Order to Show Cause, filed by David K. Grayson, Assistant Field Solicitor for the Department of the Interior, received on September 30, 1996 by the Interior Board of Land Appeals

Federal Register Notice as appeared in the Federal Register of Tuesday, July 16, 1996

Letter from Gary Mullard of Northern Stone to Glenn Carpenter of the BLM Salt Lake Field Office dated June 12, 2001 (addressing each of the issues raised in the Notice of Non-Compliance)

Letter from Gary Mullard of Northern Stone to Glenn Carpenter of the BLM Salt Lake Field Office dated June 12, 2001 entitled "Notice and Proposal" (in substance a request for modification of the approved 3809 Plan of Operations to allow certain additional activities on mill sites #3, #4, and #5)

Copy of the map dated 5-22-01 referred to in Northern Stone letter of June 12, 2001